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Supreme Court, U.S.
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In The

Supreme Court of the United States

ILLINOIS COMMERCE COMMISSION, *et al.*,

Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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15 pp

TABLE OF CONTENTS

Page

I. The Petition Presents a Justiciable Controversy that the Court Should Decide 1

II. The Seventh Circuit's Constructive Waiver Holding Is Contrary to *College Savings*, Supreme Court Precedent and the Constitution 5

III. The *Ex parte Young* Exception Applies Only to Ongoing Constitutional Violations by State Officials 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 7

AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999) ...5, 7

City of Erie v. Pap's A.M., 120 S. Ct. 1382 (2000) ... 2, 3, 4

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 3

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 1

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd., 527 U.S. 666 (1999) 6

Cory v. White, 457 U.S. 85 (1982) 8

CSX Transportation, Inc. v. Board of Public Works, 138 F.3d 537 (4th Cir. 1998) 9, 10

Edelman v. Jordan, 415 U.S. 651 (1974) 8

Ex parte Young, 209 U.S. 123 (1908) 3, 7, 9, 10

Green v. Mansour, 474 U.S. 64 (1985) 8

Han v. Department of Justice, 45 F.3d 333 (9th Cir. 1995) 9

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 8

Illinois Bell Tel. Co. v. Mathias, No. 00-8168 (N.D. Ill. filed Dec. 28, 2000) 3

Illinois Bell Tel. Co. v. Mathias, No. 00-7050 (N.D. Ill. filed Nov. 8, 2000) 3

TABLE OF AUTHORITIES – Continued

Page

Illinois Bell Tel. Co. v. Mathias, No. 98-2686 (N.D. Ill. filed May 1, 1998) 3

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 9

MCIMetro Access Transmission Serv., Inc. v. Illinois Commerce Comm'n, No. 99-7999 (N.D. Ill. filed Dec. 8, 1999) 3

MSA Realty Corp. v. Illinois, 990 F.2d 288 (7th Cir. 1993) 8

New York v. United States, 505 U.S. 144 (1992) 5, 6

Papasan v. Allain, 478 U.S. 265 (1986) 9

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 88 (1984) 9

Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, 506 U.S. 139 (1993) 1

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 8

STATUTES

47 U.S.C. § 251 6

47 U.S.C. § 252 6

47 U.S.C. § 252(b)(5) 9

47 U.S.C. § 252(c) 9

47 U.S.C. § 252(e)(1) 9

47 U.S.C. § 252(e)(5) 7

47 U.S.C. § 252(e)(6) 2, 4, 5

TABLE OF AUTHORITIES – Continued

Page

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ..... *passim*

RULES

Federal Rule of Appellate Procedure 41(d)(2) 1

I. The Petition Presents a Justiciable Controversy that the Court Should Decide.

On July 24, 2000, the Seventh Circuit issued an opinion and entered judgment in this case, No. 98-2127, affirming the district court's denial of the Illinois Commerce Commission and its Commissioners' (collectively "ICC") motion to dismiss based on Eleventh Amendment grounds. Pet. App. 54a. The case was before the court on interlocutory appeal under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).[1]

On August 3, 2000, the ICC moved to stay the mandate in case No. 98-2127 pursuant to Federal Rule of Appellate Procedure 41(d)(2) pending the filing of a petition for a writ of certiorari in the Supreme Court. The court denied the motion on September 22, 2000, and the mandate issued, returning jurisdiction to the district court.

On October 10, 2000, respondents MCI Telecommunications Corp. and MCIMetro Access Transmission Services, Inc. (collectively "MCI") and Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois"), moved in the district court to voluntarily dismiss all of their claims. On October 13, 2000, the district court granted their motion without calling the case, and dismissed the case with prejudice. The ICC first learned that the motion was granted on October 17, 2000, the date the motion was scheduled to be heard.

On October 23, 2000, the ICC asked the Seventh Circuit to recall its mandate and vacate its judgment. The

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[1] *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 147 (1993) (appeal of district court order denying a claim of Eleventh Amendment immunity permissible under the collateral order doctrine).

ICC requested that the court follow its customary practice to vacate a judgment when a case becomes moot on appeal. On November 15, 2000, the Seventh Circuit denied the motion in a summary order without reasons.

The Seventh Circuit's denial of the ICC's motion precludes a finding of mootness in this case. "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1390 (2000) (internal quotations and brackets omitted). Although the specific claims brought by the carriers are moot, the issues presented in the petition for certiorari are very much alive and continue to have ongoing effects on the parties.

The Seventh Circuit's decision requires the ICC to defend claims brought under section 252(e)(6) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) ("Act") in federal court. The district court's dismissal of the carriers' claims has not, as best as we can discern, affected the Seventh's Circuit's judgment. The Seventh Circuit's judgment is still in place and, insofar as that judgment has not been overturned or vacated, is binding on the ICC. The ICC seeks review of that coercive judgment in this Court.

The Court confronted a similar situation in *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000), and determined the case was not moot. There, the city sought review of a decision striking portions of its public indecency ordinance. *Id.* at 1390. Respondent Pap's A.M, the plaintiff below, sought to have the case declared moot because it no longer operated a nude dancing establishment in Erie. *Id.* The Court held that the case was not moot because the decision the city sought review of imposed an ongoing injury on the city. The Court explained:

> The city has an ongoing injury because it is barred from enforcing the public nudity provisions of its ordinance. If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot.

Id.

Like the city in *City of Erie*, the ICC has an ongoing injury from the Seventh Circuit's decision. The court determined that Illinois constructively waived its sovereign immunity from suit in federal court by failing to forbid the ICC from performing its responsibilities under the Act. Pet App. 43a n.10. Alternatively, the court held that the suits could proceed against the individual commissioners under the *Ex parte Young* doctrine. *Id.* at 45a. As a consequence, the ICC is forced to litigate section 252(e)(6) claims in federal district court. That injury is "real and immediate" and, hence, precludes a finding of mootness. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

In fact, there are several cases brought by respondents Ameritech Illinois and MCI against the ICC pending in the United States District Court for the Northern District of Illinois, cases affected by the Seventh Circuit's decision. Two have been stayed or otherwise held in abeyance pending disposition of this appeal. *Illinois Bell Tel. Co. v. Mathias*, No. 98-2686 (N.D. Ill. filed May 1, 1998); *MCIMetro Access Transmission Serv., Inc. v. Illinois Commerce Comm'n*, No. 99-7999 (N.D. Ill. filed Dec. 8, 1999). Ameritech Illinois recently brought two more actions against the Commissioners under section 252(e)(6) of the Act in federal district court. *Illinois Bell Tel. Co. v. Mathias*, 00-8168 (N.D. Ill. filed Dec. 28, 2000); *Illinois Bell Tel. Co. v. Mathias*, No. 00-7050 (N.D. Ill. filed Nov. 8, 2000). Thus, there has been no dissipation in the

controversy and the litigation between the parties over the issues presented in the petition continues.

In addition, the parties have a legally cognizable interest in the outcome. The respondent carriers seek to preserve a judgment in their favor that allows them to bring section 252(e)(6) actions against the ICC in federal court, notwithstanding the Eleventh Amendment bar. Respondents United States and the FCC seek to uphold an interpretation of the Act that allows claims against state commissions and their commissioners to be brought by private parties under section 252(e)(6). The petitioners seek to overturn the Seventh Circuit's judgment that compels them to litigate such claims in federal court. A determination by this Court that the Eleventh Amendment bars section 252(e)(6) actions against the ICC (or that section 252(e)(6) does not confer jurisdiction on federal district courts over state commissions (or their commissioners)) will require reversal of the Seventh Circuit's judgment, dismissal of the carriers' actions pending in federal district court, and preclude future claims brought under section 252(e)(6) against the ICC. Accordingly, the parties have a personal stake in the outcome of this case and the ICC continues to suffer harm that a favorable decision by this Court will remedy.

Additional considerations militate against a finding of mootness. The respondent carriers voluntarily dismissed their claims only after receiving a favorable decision from the Seventh Circuit. They now suggest that the case is moot. MCI Br. 13-14; Amer. Br. 7. In *City of Erie*, the Court noted that "[its] interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness." *City of Erie*, 120 S. Ct. 1382, 1390-91.

The public interest in having an authoritative ruling on these important issues is compelling. The Court has already noted that the implementation of the Act is of substantial local and national importance. *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371, 397 (1999). Many state commissions and individual commissioners have been forced to litigate section 252(e)(6) actions in federal court. In addition, many carriers (including Ameritech Illinois and MCI), faced with the uncertainty of whether a state or federal venue is proper, have filed parallel actions in both state and federal courts, increasing the burden on the judiciary. The United States and the FCC have intervened in this case to defend the constitutionality of the Act. All parties recognize the importance of the issues raised in the petition. The issues are well-defined and have been brought into sharp focus by adverse litigants for the Court's review. Accordingly, this case is not moot and presents an exceptional case for review.

II. The Seventh Circuit's Constructive Waiver Holding Is Contrary to *College Savings*, Supreme Court Precedent and the Constitution.

Nothing in respondents' briefs in opposition calls into question the need for this Court to review and reverse the decision below.

1. Ameritech Illinois' contention (Amer. Br. 8-9) that Congress may use its commerce power to *condition* a state's participation as a regulator in the federal scheme on waiver of the state's sovereign immunity ignores the bedrock principle of constitutional law that the federal government is one of limited and enumerated powers. The Commerce Clause empowers Congress to regulate interstate commerce, not to regulate state sovereign immunity. *See New York v. United States*, 505 U.S. 144

(1992) ("The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."). Ameritech Illinois errs in treating each of Congress' Article I powers as equivalent. None of the Court's cases it cites (Amer. Br. 9) stand for the proposition that Congress may in the exercise of its commerce power demand, as a condition for state participation under the Act, the waiver of the state's sovereign immunity.

2. Respondents err in contending that constructive waiver under the Commerce Clause survived *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666 (1999). *College Savings* rejected the doctrine of constructive waiver under the Commerce Clause and confirmed that a state's waiver must be a deliberate, express waiver made by the state itself. *Id.* at 680-83.

In addition, respondents' characterization of the states' role in regulating local telecommunications as "deputized federal regulators" regulating on behalf of Congress is erroneous. *See, e.g.*, Amer. Br. 12. "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart." *New York v. United States*, 505 U.S. at 188. Congress reserved to the states important responsibilities in implementing sections 251 and 252 of the Act. That the ICC was called upon to interpret and apply a federal statute does not transform it into a "deputized federal regulator" any more than the conduct of a state court in interpreting and applying federal law transforms that court into a federal

one. Moreover, respondents' characterization denigrates the states' sovereignty and their place in our federal system. The Act in no way supports this view of the states' role, and there is no indication that Congress intended to treat the states in such a manner.

Contrary to the United States' view, the Act does not confer "*new* regulatory authority" on the states. (U.S. Br. at 21). The states have always had (and continue to have) the inherent authority to regulate local telecommunications under their police powers. Section 252(e)(5) provides a backstop remedy when a state commission fails to carry out its responsibilities under section 252. *Iowa Utilities*, 525 U.S. at 406 (Thomas, J., dissenting). It does not represent an "offer" to regulate (U.S. Br. 15-16), let alone constitute a *quid pro quo* condition requiring states to waive their immunity in exchange for fulfilling their section 252 responsibilities.

III. The *Ex parte Young* Exception Applies Only to Ongoing Constitutional Violations by State Officials.

Respondents err in contending that application of the *Ex parte Young* exception to the Eleventh Amendment does not require a constitutional predicate. Amer. Br. 18-19; MCI Br. 18-19; U.S. Br. 23 n.13. *Ex parte Young*, 209 U.S. 123 (1908), involved alleged constitutional violations. *Id.* at 144, 159-60, 168 (affirming order of federal court enjoining the Minnesota Attorney General from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment). This Court's subsequent decisions have limited application of the *Ex parte Young* exception to alleged constitutional violations. Indeed, this Court's recent decision in *Alden v. Maine*, 527 U.S. 706 (1999), reaffirmed that the principle of state sovereign immunity embodied in the Eleventh Amendment is a

constitutional limitation on the federal judicial power in Article III. *Id.* at 733. Respondents' contention impermissibly seeks to expand that exception to encompass the circumstances in this case.

The cases cited by respondents involve the Constitution, whether by virtue of the Supremacy Clause or other constitutional provisions. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 265-66 (1997) (Supremacy Clause); *Green v. Mansour*, 474 U.S. 64, 65-66 (1985) (Supremacy Clause and Fourteenth Amendment); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 155-56 (1978) (Supremacy Clause and Commerce Clause); *Edelman v. Jordan*, 415 U.S. 651, 653 & n.1 (1974) (Supremacy Clause and Fourteenth Amendment); *MSA Realty Corp. v. Illinois*, 990 F.2d 288, 290 (7th Cir. 1993) (Fourteenth Amendment). *Cory v. White*, 457 U.S. 85 (1982), did not involve an alleged violation of the Constitution, federal law or state law. *Id.* at 86, 91.

Regarding the particular circumstances of this case, respondents concede that the ICC is authorized by federal law to interpret and apply federal law in arbitrating and approving agreements under the Act. *E.g.*, Amer. Br. 2. They cite to no authority, for there is none, to support the proposition that, given the authority to make decisions, an allegedly erroneous decision by state officials overrides a state's sovereign immunity.[2] In fact, this

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[2] In footnote 4 of its brief Ameritech Illinois misconceives the sovereign immunity issue as one of discretion. The issue here is not whether the ICC "ha[s] a right to misapply federal law," but rather whether an allegation that the ICC has misapplied federal law overrides Illinois' sovereign immunity and allows private parties to bring suit against the state in federal court. Amer. Br. 19 n.4. As the Court's opinions establish, it is the power of the state official to make the decisions in the first place, and not the correctness of a

Court has already rejected such a proposition. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 88, 113 n.22 (1984) ("*Pennhurst II*").

In addition, Ameritech Illinois contends (Amer. Br. 20-21) that the ICC's arbitration determinations have ongoing "effects" or "legal consequences" that warrants application of the *Ex parte Young*. This contention is without merit. The focus of the *Ex parte Young* inquiry is on actions of state officials, and the relevant inquiry is whether prospective relief could prevent an ongoing *violation* of federal law by state officials. *Pennhurst II*, 465 U.S. at 102-03. No party in this case claimed a present, ongoing *violation* by the Commissioners.

The ICC, "in carrying out its function as an arbitrator," resolved open issues and imposed appropriate conditions on the parties to the agreement. 47 U.S.C. § 252(b)(5), (c). Afterwards, the parties incorporated those determinations into their agreement and submitted it for approval as required by section 252(e)(1). The relief sought by MCI and Ameritech Illinois is from a past ICC arbitration decision that they incorporated into their agreement.[3] *Han v. Department of Justice*, 45 F.3d 333, 338

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particular decision, that is relevant to the sovereign immunity analysis.

[3] The cases cited by Ameritech Illinois are inapposite. In *Papasan v. Allain*, 478 U.S. 265 (1986), the state officials were alleged to be in violation of federal law at the precise moment the case was filed. *Id.* at 282. Here, however, respondents do not contend that the Commissioners themselves were violating federal law when the claims were filed. In *CSX Transportation, Inc. v. Board of Public Works*, 138 F.3d 537 (4th Cir. 1998), plaintiff railroads sought to enjoin the state board's collection of taxes, and not the completed tax assessments. *Id.* at 539, 543. Significantly, the railroads specifically alleged that the state

(9th Cir. 1995). The agreement itself does not constitute an ongoing violation for purposes of *Ex parte Young*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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officials threatened to collect the taxes. *Id.* at 539. Here, however, the carriers seek relief from a past ICC arbitration decision that they incorporated into their agreement and the carriers did not allege that the Commissioners have enforced or threatened to enforce the specific terms of the agreement alleged to violate federal law.